Filed 6/7/17 P. v. Davis CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ERIC DAVIS, Defendant and Appellant.	B265537 (Los Angeles County Super. Ct. No. TA136469)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teresa P. Magno, Judge. Affirmed in part and reversed in part.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn M. Webb and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Steven Eric Davis was charged with a single count of pandering by procurement. (Pen. Code, § 266i, subd. (a)(1)).[1] The case was tried, however, on the theory that Davis committed pandering by encouragement (*id.*, subd. (a)(2)), and the trial court instructed the jury on that theory. The verdict form, which was tied to the charge and never was conformed to the proof and instructions, states that the jury found Davis guilty of pandering by procurement. Davis did not object to the variance or the verdict form.

On appeal, Davis contends the evidence was insufficient to support his pandering conviction and the trial court committed prejudicial error in declining to instruct the jury on the lesser included offense of attempted pandering. Evaluating these claims under the rubric of pandering by encouragement, we conclude that substantial evidence supports Davis's pandering conviction and that any error in the court's failure to instruct on attempted pandering was harmless.

Davis also challenges two separate one-year sentence enhancements the trial court imposed based on prior felony convictions for which he served prison terms (§ 667.5, subd. (b)). Davis contends that these enhancements should be stricken because, after the court imposed them, the felony convictions on which they rested were reduced to misdemeanors pursuant to Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18). We agree. In our view, the reduction of a felony conviction to a misdemeanor under Proposition 47 invalidates a sentence enhancement based on that conviction when the

---

[1] Statutory references are to the Penal Code unless otherwise stated.

judgment of which the enhancement is a part has yet to become final. Because the judgment in this case was not final when the prior felony convictions on which the challenged enhancements rested were reduced to misdemeanors, the enhancements must be stricken from his sentence. The judgment is affirmed in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On April 7, 2015, the People filed an information charging Davis with one count of pandering by procurement in violation of section 266i, subdivision (a)(1). to the elements of pandering by encouragement (§ 266i, subd. (a)(2)), and stated that the People intended to prove that Davis encouraged an undercover law enforcement officer to become a prostitute. Davis did not object to the variance between the information and the theory on which the prosecution proceeded at trial.[2]

A. *The Prosecution's Evidence of Pandering By Encouragement*

1. *The 2015 Undercover Investigation of Davis for Pandering*

In early February 2015, Detective Gary Furuyama of the Los Angeles County Sheriff's Department became aware of two flyers that someone had posted at a Metrolink station in the City of Compton. The flyers depicted the posterior of a woman in blue shorts. They advertised work paying "[$]75.00 to [$]100.00 an

---

[2] Davis's counsel reserved an opening statement. She never made one, however. And Davis did not testify at the trial or put on a defense case.

hour" with benefits including "housing hair nails smokes and food." One of the flyers also referred to "adult entertainment and escort services." Both flyers listed the same phone number for interested persons to call. They identified the person to call as "Shermen Williams."

At the time he became aware of the flyers, Furuyama was assigned to the vice detail of the sheriff's department major crimes unit. The vice detail is responsible for the investigation of crimes of moral turpitude, including the recruitment of prostitutes. Furuyama previously had conducted undercover investigations arising from the posting of similar flyers. Furuyama testified that, based on his experience, the type of compensation promised in the flyers (hair and nail care, smokes, and food) for purported "escort services" was a strong signal that the person who posted the flyers was seeking to recruit persons for prostitution.

Furuyama thus decided to conduct an undercover investigation into the flyers. To that end, he sought the assistance of Los Angeles County Sheriff's Deputy Miesha McClendon. Furuyama previously had worked with McClendon on similar investigations. McClendon had been involved in 15 to 20 prior prostitution-related undercover investigations.

McClendon testified that, posing as an interested person, on February 4, 2015, she called the phone number on the flyers. She spoke with a man who stated that he was Shermen Williams, the contact person listed on the flyers. This person turned out to be Davis. McClendon asked Davis about the job that was advertised on the flyers. In response, Davis asked if she wanted to apply, and McClendon said that she did. Davis asked McClendon what she looked like; she provided a physical

description. Davis asked her to send him some pictures. McClendon stated that she needed some information first. They agreed to talk again later.

That evening, they spoke by phone. McClendon asked Davis what kind of escort services the job entailed. Davis responded that the flyers were "pretty straightforward" and, "everybody know [*sic*] what escort service is." McClendon stated that a friend of hers "did some escort stuff and it was, like, you know, she was fucking, and you know, she was doing this, that but she was also doing, like, dancing and massaging." Davis responded, "Well, right, right." He added, "So, all I can tell you right now is that you already understand what the job was based on, you know?" McClendon asked him, "what if I'm, like, not cute and then, but I got some bomb ass fucking skills[?]" Davis responded that he would "be the judge of it," and used the word "trick" to describe those for whom she would be providing services.

The following day McClendon emailed photos of herself to Davis, as he had requested. After Davis received the photos, the two spoke again by phone. In that conversation, Davis commented on McClendon's physical appearance as depicted in the photos. McClendon turned the subject of the conversation to seeking more information from Davis about the job. In response, Davis told her that all of the money she earned per hour would be hers to keep. McClendon also asked Davis what he would get out of the arrangement, to which Davis responded that McClendon was "sounding like an investigator." The two spoke several more times over the next few days and agreed to meet in person at a restaurant in Lynwood between 8:00 and 9:00 on the morning of February 7, 2015.

McClendon was the first to arrive at the restaurant that morning. She wore a wire and waited for Davis in the far corner of the restaurant. Furuyama was working undercover on the scene as well, along with sheriff's department deputies. Davis arrived at the restaurant around 9:40 a.m. Shortly before arriving, he called McClendon by phone from his car. He stated that he was about to pull up and asked McClendon, "You not the police, are you?" Davis said that he was concerned about that possibility because the photographs McClendon had sent him did not clearly show her face. McClendon responded that she was concerned about the potential misuse of a photograph of her face and that she would need to know Davis better before sending him such a photograph. A short time later Davis called McClendon on the phone again and asked her to meet him outside the restaurant. McClendon stated that she would be more comfortable meeting him inside the restaurant.

Within a few minutes after that, Davis entered the restaurant and approached McClendon. Davis stated that they should go outside, but McClendon said that she preferred to talk with him inside the restaurant. After further conversation, Davis stated, "I'm not comfortable talking to you here," and asked McClendon to go with him to his car. McClendon ignored the request and steered the conversation to the nature of Davis's business. Davis stated that he could make a flyer with McClendon's picture on it, setting forth a price, the words "escort service," and a phone number. McClendon asked if there were "other girls" and whether she would be "number 5 or 6 in line when guys call." Davis responded, "whoever is available with the best schedule, all I could tell you is you're available . . . it's a 24-hour service, it's 24 hours, and not one worker is gonna be

working for 24 hours. Follow me? That's a lot of work." Davis next said, "Personally, I'm not into games . . . [a]ll I do is just . . . street pimp." McClendon asked what that meant. Davis laughed and said, "Obviously I have my own creative ways of saying . . . ."[3] McClendon then said, "I'm the one doing all the fucking," to which Davis responded, "I'm gonna enjoy it."

At some point during her conversation with Davis at the restaurant, McClendon gave a signal to the sheriff's deputies who were present on the scene. The deputies approached the table where Davis and McClendon were seated. They arrested Davis. The deputies also searched Davis's car. In it, they found between 50 and 100 flyers with images of women and the words "Jobs" and "Qualifications."

2. *The Prior Undercover Investigation of Davis for Pandering*

In addition to Furuyama and McClendon, the People called as a witness at trial Los Angeles Police Department Officer Erika Kirk, who had conducted a previous undercover investigation of Davis for pandering that led to Davis's arrest and subsequent conviction in 2009 for attempted pandering. Over Davis's objection, the trial court permitted Kirk to testify under Evidence Code section 1101, subdivision (b), regarding Davis's misconduct in the prior case to prove that Davis intended to commit the charged offense in this case.[4] The court informed the jury that

---

[3] According to the transcript of the recording admitted at trial, ellipses indicate inaudible portions of the conversation.

[4] On appeal, Davis does not challenge that ruling. Thus, we do not address it.

the parties stipulated that Davis was convicted of attempted pandering based on the events described in Kirk's testimony.

Kirk testified that her investigation arose from a flyer Davis posted that contained the words, "Attention Ladies, Pimp" and a photograph of a torso. Posing as an interested person, Kirk called the phone number on the flyer. A man who turned out to be Davis answered and asked her to "send a face pic." Davis also told her, "I have tricks that wanna spend big money," referred to himself as "your pimp," and said, "We need to get you to work."

After several phone calls and text messages over a period of three weeks, Kirk arranged to meet Davis in a restaurant. When they met there, Davis told Kirk that he would put her to work along the Sepulveda corridor and in a casino, that she would earn $300 an hour because he wanted to run a high-end business, and that he would provide her with housing and take care of her, including her hair and nails.

B. *The Trial Court Instructs the Jury on Pandering by Encouragement and Declines To Instruct on Attempted Pandering by Encouragement*

At the jury instruction conference, the People requested that the trial court instruct the jury on pandering by encouragement, not pandering by procurement. Davis did not object. The court accepted the People's request and instructed the jury on pandering by encouragement.

Davis requested an instruction on the lesser included offense of attempted pandering, which the court understood to mean attempted pandering by encouragement The court declined to give that instruction, stating that it did not "see how, with the evidence presented in this trial, that any jury would convict on

the lesser-included offense of attempted pandering and not on the charged crime of pandering."

In closing argument, both the prosecutor and Davis's counsel framed the case as involving alleged pandering by encouragement and stated the central issue was whether Davis encouraged McClendon to become a prostitute. Neither side made any reference to pandering by procurement.

C. *The Verdict and Sentence*

Although the trial court instructed the jury on pandering by encouragement, the verdict form it provided asked the jury to decide whether Davis was guilty of the pandering by procurement charge in the information, which never was conformed to the proof at trial. Davis made no objection, however, to the variance between the instructions and the verdict form. On June 11, 2015, the jury found Davis "guilty of the crime of pandering by procuring in violation of . . . section 266i[, subdivision] (a)(1) . . . ."

On July 15, 2015, the court conducted a bench trial on allegations in the information that Davis had suffered five prior felony convictions for which he served prison terms (§ 667.5, subd. (b)).[5] The court found those allegations to be true. It sentenced Davis to the upper term of six years on the pandering conviction, plus separate one-year enhancements under section 667.5, subdivision (b), for each of the five prior prison terms, for an aggregate prison term of 11 years. Two of the sentence enhancements were based on convictions Davis had suffered for

---

[5] Before the start of the jury trial on the pandering charge, the court granted Davis's motion to bifurcate the trial on the allegations of the prior convictions.

burglary and petty theft with a prior, respectively. The trial court denied Davis's request to stay the imposition of those enhancements pending resolution of an application that Davis's counsel stated that she recently had filed on Davis's behalf under Proposition 47 to designate as misdemeanors his convictions for burglary and petty theft with a prior.

Davis timely appealed from the judgment.

Three months after Davis appealed, the trial court that had entered the judgments on Davis's convictions for burglary and petty theft with a prior granted Davis's Proposition 47 application to designate those convictions as misdemeanors.

DISCUSSION

A. *Davis's Challenges to the Pandering Conviction Lack Merit*

Davis claims that there is insufficient evidence to support his pandering conviction and that the trial court committed prejudicial error in failing to instruct the jury on the lesser included offense of attempted pandering. Evaluating Davis's claims through the prism of pandering by encouragement, we conclude that they are meritless.

1. *The Law on Pandering*

Section 266i, subdivisions (a)(1) through (a)(6), sets forth six different ways in which the offense of pandering can be committed. (*People v. Zambia* (2011) 51 Cal.4th 965, 977-978; see also *People v. Lax* (1971) 20 Cal.App.3d 481, 486 [§ 266i's subdivisions "do not state different offenses but merely define the different circumstances under which the crime of pandering may be committed"].) One of those ways is pandering by procurement,

which occurs when a person "[p]rocures another person for the purpose of prostitution." (§ 266i, subd. (a)(1).) Another way to commit pandering is by encouragement. This occurs when a person "[b]y promises, threats, violence, or by any device or scheme, causes, induces, persuades, or encourages another person to become a prostitute." (*Id.*, subd. (a)(2).) Both pandering by procurement and pandering by encouragement are specific intent crimes. (*Zambia*, *supra*, at p. 980.) The chief difference between them is that the former requires successful procurement of a person for prostitution while the latter does not require successful encouragement of a person to become a prostitute. (See *People v. Bradford* (1973) 31 Cal.App.3d 421, 425-426.)

2. *Davis's Challenges to the Pandering Conviction Should Be Evaluated Under the Rubric of Pandering by Encouragement*

Davis was charged with pandering by procurement. However, the trial proceeded on the theory that Davis committed pandering by encouragement, and the trial court instructed the jury on pandering by encouragement, using CALCRIM No. 1151, Alternative 1B. The instruction stated, "The defendant is charged with pandering in violation of Penal Code section 266i. [¶] To prove that the defendant is guilty of pandering, the People must prove that: [¶] 1. The defendant used promises or any device or scheme to encourage Deputy McClendon to become a prostitute; [¶] 2. The defendant intended to influence Deputy McClendon to become a prostitute. [¶] It does not matter

whether Deputy McClendon was a prostitute already or an undercover police officer. . . ."[6]

The verdict form, however, was based on the information, not the instruction. Thus, when the jury convicted Davis of pandering, it found him guilty of pandering by procurement.

On appeal, the parties' briefs addressed Davis's challenges to the conviction under pandering by encouragement, without any mention of the variance between the instruction and the verdict form. Primarily because pandering by procurement requires proof of success while pandering by encouragement does not, we asked for supplemental letter briefs on whether Davis's challenges to his pandering conviction should be reviewed under pandering by procurement, pandering by encouragement, or both; whether Davis was prejudiced by the instruction on pandering by encouragement; and whether Davis forfeited any claim of error arising from the variance. In his letter brief, Davis changed course from his opening and reply briefs and urged that we evaluate his claims under pandering by procurement only. The People adhered to their position that the claims should be evaluated under pandering by encouragement only.

We conclude that Davis forfeited any claim of error arising from the variance between the pandering by procurement charge

---

[6] The instruction's reference to McClendon's work as an undercover police officer embodies the principle that "the proscribed activity of encouraging someone 'to become a prostitute,' as set forth in section 266i, subdivision (a)(2), includes encouragement of someone who is already an active prostitute, or undercover police office." (*People v. Zambia*, *supra*, 51 Cal.4th at p. 981.) The instruction also defined prostitution, consistent with the definition set forth in CALCRIM No. 1151.

and conviction, and the pandering by encouragement theory of the case and instruction.

Contrary to Davis's contention in his letter brief, there was no misdirection or surprise by the prosecutor that led the trial court to give an inapplicable instruction. The prosecutor announced in his opening statement that the People would be proceeding on the theory of pandering by encouragement. Davis did not object to the variance between the information and the declared theory of the case. The People then presented evidence that sought to prove that Davis encouraged an undercover law enforcement officer to become a prostitute. There was no objection from Davis to the variance between the pleading and the proof. Next, consistent with the evidence that was presented at trial, the People asked the trial court to instruct the jury on pandering by encouragement, using Alternative 1B in CALCRIM No. 1151. Davis acceded to this request. In closing argument, both the prosecutor and Davis's counsel made their presentations to the jury in terms of pandering by encouragement; pandering by procurement was not mentioned by either attorney. Finally, Davis failed to object to the variance between the instruction on pandering by encouragement and the verdict form's reference to pandering by procurement. It was not until our request for supplemental briefing that Davis complained about the variance. This was too late. He thus forfeited any claim of error arising from the variance. (See *People v. Maury* (2003) 30 Cal.4th 342, 427 [forfeiture due to failure to object to variance between pleading and proof]; *People v. Jones* (2003) 29 Cal.4th 1229, 1259 [forfeiture due to failure to object to asserted error in the verdict form].)

Forfeiture aside, we also conclude that Davis was not prejudiced by the variance. Davis claims that prejudice inheres in the fact that the verdict form manifests his conviction for an offense on which the jury was not instructed. He asserts that there is "no authority which could allow the sufficiency of the evidence to be evaluated under a criminal statute other than for which [a defendant] was convicted."

Davis overlooks *Lax*, which furnishes that authority, and in a pandering case no less. In *Lax*, the charge against the defendant in the information was "couched in the language of" section 266i, subdivision (a)(3) (formerly subd. (c)) (*People v. Lax*, *supra*, 20 Cal.App.3d at p. 487), which states that pandering may be committed by "[p]rocur[ing] for another a person a place . . . in a house of prostitution . . . ." (§ 266i, subd. (a)(3).) The People proceeded at trial, however, on a theory of pandering by encouragement, and the jury was instructed on that theory. (*Lax*, *supra*, at p. 487.) The jury found the defendant "guilty as charged" in the information. (*Id*. at p. 483.) Notwithstanding the variance between the charge, on the one hand, and the proof and instruction on the other, the court in *Lax* concluded that the defendant was not prejudiced because he "knew what he had to defend against and made his defense accordingly; and at no time [did] he ever claim[] he was misled." (*Id*. at p. 487.)

The same can be said about Davis in this case. He knew from the outset of the trial that the theory of pandering by encouragement on which the case was tried deviated from the pandering by procurement charge in the information. Davis failed to show in his letter brief that he was caught off guard by the prosecutor's change of theories and hence was unprepared to defend the case on the new theory.

Yes, the People's change of theory from pandering by procurement to pandering by encouragement may have made it easier to obtain a pandering conviction. That is because, in proceeding under a pandering by encouragement theory, the People did not have to prove that Davis successfully encouraged McClendon to become a prostitute. By contrast, had the case been tried on a pandering by procurement theory, the People would have had to prove that Davis successfully procured McClendon for prostitution. And based on the evidence presented at trial, the People may not have been able to show successful procurement. That the variance between the information and the theory of the case may have lightened the People's burden does not mean, however, that Davis was prejudiced by it. The question is whether the variance impeded Davis's ability to mount a defense to the evidence the People presented at trial. (*People v. Lax*, *supra*, 20 Cal.App.3d at p. 487.) The answer to that question is no. Indeed, Davis's counsel conceded at oral argument that the variance caused no prejudice to Davis.

Davis suffered no prejudice from the variance for the additional reason that the punishment for pandering by procurement is identical to the punishment for pandering by encouragement: "imprisonment in the state prison for three, four, or six years." (§ 266i, subd. (a).)[7] The jury's finding that Davis

---

[7] Our conclusion that Davis was not prejudiced defeats Davis's claim, made in his letter brief, that his trial counsel's failure to object to the instruction on pandering by encouragement constituted ineffective assistance of counsel. (See *People v. Johnson* (2015) 60 Cal.4th 966, 979-980 [to establish ineffective assistance of counsel, a defendant must show that

was guilty of pandering by procurement is thus essentially a technical defect that has no ramifications for Davis. We can disregard a technical defect in a verdict form when the intent behind the jury's verdict is clear. (See *People v. Johnson* (2015) 61 Cal.4th 734, 785.) Here, the jury unmistakably intended to convict Davis of pandering by encouragement because that is the theory of pandering that was presented to the jury at trial and on which the jury was instructed.

3. *Substantial Evidence Supports the Pandering Conviction*

Davis contends the evidence is insufficient to support his pandering conviction. According to Davis, the evidence showed that he was recruiting McClendon for lawful escort services. We review this challenge to the conviction under the substantial evidence standard, which seeks to determine whether, "'"on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]"'" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.) In applying this standard, "'"we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*Id.* at p. 739.) Nor do we resolve witness credibility issues or conflicts in the evidence, because that is the jury's province. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Applying this standard, there was sufficient evidence that Davis committed the offense of pandering by encouragement. The language that Davis used in the flyers, his statements in the

---

counsel's deficient performance was prejudicial, among other requirements].)

multiple conversations he had with McClendon over the phone and then during their meeting at the restaurant, and Kirk's testimony about the events leading to Davis's 2009 conviction all provided a reasonable basis for the jury to find that Davis encouraged McClendon to become a prostitute.

To begin with, Furuyama testified that, based on his experience in conducting pandering investigations, women working as prostitutes commonly receive as compensation exactly what Davis's flyers advertised: care for hair and nails, and "smokes." Furuyama also testified that, based on his experience, the phrase "escort services" on such flyers is a red flag for prostitution-related activities. So too, Furuyama said, was Davis's use in his conversations with McClendon of the words "street pimp" to describe himself and "trick" to describe customers of the services that McClendon would be providing. Furuyama testified that a "pimp" is a person who organizes and controls prostitutes and receives money from their acts of prostitution, and the term "trick" refers to a prostitute's customer.

To be sure, Davis never explicitly told McClendon that the work he was asking her to do involved prostitution, as opposed to legitimate escort services. Further, it was McClendon, not Davis, who raised the topic of sex in their conversations.

On the other hand, Davis's statement to McClendon, "you already understand what the job was based on," in response to her comment that her friend's job as an escort involved "fucking" as well as "dancing and massaging," could lead the jury rationally to conclude that Davis was encouraging her to engage in prostitution. The jury could draw the same inferences from Davis's statement to McClendon at the restaurant that he would

"enjoy it," in response to her comment that she would be the one "doing all the fucking." Indeed, it may have been significant to the jury that, whenever McClendon raised the topic of sex during their conversations, Davis never denied that the job would involve sex acts. And Davis's use of a false name (Shermen Williams) on the flyers and when answering the first call from McClendon, as well as his recurring expression of concern to McClendon that she might be a police officer, could have prompted the jury to believe that Davis's business was unlawful, not a lawful escort service.

The jury also could have concluded that Davis intended to commit pandering by encouragement based on the events that Kirk described regarding Davis's pandering in a prior case. (*People v. Leon* (2015) 61 Cal.4th 569, 597-598 [evidence of a defendant's past criminal acts can be probative under Evid. Code, § 1101, subd. (b), of the defendant's intent to commit a similar crime].) Kirk's testimony revealed clear parallels between the 2009 pandering case against Davis and this case. Those parallels reasonably could have informed the jury's decision to convict Davis.

In sum, based on our review of the record, we reject Davis's challenge to the sufficiency of the evidence supporting his pandering conviction.

4. *Any Error in Declining To Instruct the Jury on the Lesser Included Offense of Attempted Pandering Was Harmless*

The trial court must instruct the jury not only on the crime charged by the prosecution, but also on lesser offenses of the crime charged and supported by the evidence. (*People v. Barton*

(1995) 12 Cal.4th 186, 190.) A lesser offense is necessarily included within a greater offense if the elements of the greater offense or the facts alleged in the accusatory pleading include all of the elements of the lesser offense. (*People v. Smith* (2013) 57 Cal.4th 232, 240.) However, "'[a]n instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense.'" (*People v. Nelson* (2016) 1 Cal.5th 513, 538.) On appeal, we independently determine whether the trial court erred by failing to instruct on a lesser included offense. (*Id.* at p. 538.)

The failure to instruct on a lesser included offense is reversible error if and only if it is reasonably probable that the defendant would have obtained a more favorable result absent the error. (*People v. Thomas* (2012) 53 Cal.4th 771, 814; *People v. Breverman* (1998) 19 Cal.4th 142, 177-178.) Although the evidence may be legally sufficient to support an instruction on a lesser included offense, the relative weight of the evidence may compel the conclusion that there is no reasonable probability that the failure to instruct affected the result. (*People v. Beltran* (2013) 56 Cal.4th 935, 956; *Breverman*, *supra*, at pp. 177-178.)

Davis claims the trial court committed prejudicial error in denying his request for a jury instruction on the lesser included offense of attempted pandering. He argues that the jury could have reasonably found that he asked McClendon to leave the restaurant with him because he intended to use the opportunity while they were outside to encourage her to engage in prostitution, but he was thwarted in that effort when she refused to go outside. According to Davis, everything up to that point

constituted, at most, attempted pandering, and not actual pandering.

We consider it highly unlikely on the evidence in this case that the jury could have found Davis guilty of attempted pandering by encouragement had it been afforded that option. Indeed, we are hard-pressed to think of factual circumstances in which a defendant could be found guilty of attempted pandering by encouragement, but not pandering by encouragement. In virtually all pandering by encouragement cases, the defendant will be either guilty of pandering by encouragement or not guilty of pandering by encouragement; the middle ground of attempted pandering by encouragement rarely would exist.[8]

But even if the jury could have found that, up to the point he was arrested at the restaurant, Davis was not encouraging McClendon to become a prostitute but only attempting to do so, such a finding was not reasonably probable. Thus, any error by the trial court in failing to instruct on attempted pandering was harmless.

The evidence of Davis's guilt of pandering by encouragement was strong. His flyers offering "housing, hair, nails, smokes, and food" in exchange for working in "adult entertainment and escort services"; his use of the terms "street pimp" and "trick" in discussing the work with McClendon; his approving reaction when McClendon said that her friend's escort

---

[8] For example, it is possible that a conviction for attempted pandering by encouragement might lie if the only evidence was a communication from the defendant encouraging the intended recipient to become a prostitute but that never reached the intended recipient because it was sent to the wrong address or phone number.

job involved "fucking" as well as "dancing and massages"; his use of a false name and avoidance of any explicit mention of what the job entailed; and his expressed concern that McClendon was working with law enforcement all suggested rather unmistakably that he was encouraging McClendon to engage in prostitution. Defendant's prior conduct in encouraging Kirk to engage in prostitution using flyers with similar language is further evidence that he was encouraging McClendon to engage in prostitution.

In sum, we conclude that there is no reasonable probability that the jury would have found Davis guilty of only attempted pandering had the court instructed the jury on that lesser included offense.

B. *The Reduction of a Felony Conviction to a Misdemeanor Under Proposition 47 Invalidates a Sentence Enhancement Based on That Conviction When the Judgment of Which the Enhancement Is a Part Has Yet To Become Final*

In sentencing Davis, the trial court imposed five separate one-year enhancements under section 667.5, subdivision (b) (§ 667.5(b)) based on prior felony convictions for which he served prison terms. Davis challenges the validity of two of those enhancements, one of which was based on a prior conviction for burglary, and the other on a prior conviction for petty theft with a prior. Both of those convictions were reduced to misdemeanors under Proposition 47 after the trial court imposed the sentence in this case. Davis claims that the reduction of the convictions to misdemeanors rendered the associated enhancements unlawful.

Based on our reading of section 667.5(b) and Proposition 47, we agree.[9]

1. *Relevant Statutory Provisions*

"'[S]ection 667.5(b) . . . provides a special sentence enhancement for [a] particular *subset* of "prior felony convictions" that were deemed serious enough by earlier sentencing courts to warrant actual imprisonment. . . .'" (*People v. Jones* (1993) 5 Cal.4th 1142, 1148.) Imposition of the enhancement "requires proof that the defendant "'(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.'" [Citation.]" (*People v. Abdallah* (2016) 246 Cal.App.4th 736, 742 (*Abdallah*).) "Courts sometimes refer to the fourth requirement, which exempts from the enhancement defendants who have not reoffended for five years, as ""washing out"" . . . "'because it carries the connotation of a crime-free cleansing period of rehabilitation after a defendant has

---

[9] The People argue that we cannot consider Davis's Proposition 47 challenge to the sentence enhancements because he did not challenge them in the trial court; he merely asked the court to stay imposition of the enhancements pending disposition of an application to reclassify the convictions on which the enhancements would rest. This argument is mistaken. Davis contends that the enhancements became unlawful once the associated convictions were reduced to misdemeanors. An unlawful sentence can be corrected at any time, even when its propriety is raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

had the opportunity to reflect upon the error of his or her ways.'" [Citations.]" (*Ibid*.)

Proposition 47 reclassified as misdemeanors certain criminal offenses that were previously classified as felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). It also established procedures for persons convicted of those crimes to recall their felony sentences and have them reduced to misdemeanors. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Specifically, section 1170.18, subdivision (a) (section 1170.18(a)) provides a mechanism by which a person who was on the date of Proposition 47's enactment serving a felony sentence for an offense that Proposition 47 reduced to a misdemeanor may petition to recall that sentence and seek resentencing. To be eligible for resentencing under section 1170.18(a), the petitioner must demonstrate that the sentence that he or she is serving is "'"for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed."'" (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449.) Subdivision (b) of section 1170.18 provides, in turn, that a petitioner who is eligible for resentencing "'shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." [Citation.]' [Citation.]" (*People v. Hall* (2016) 247 Cal.App.4th 1255, 1261.) Section 1170.18, subdivisions (f) and (g), provide similar relief for persons who have completed felony sentences for offenses that Proposition 47 reclassified as misdemeanors; these provisions authorize such persons to file an application to have their convictions designated as misdemeanors. (§ 1170.18, subds. (f),

(g).) Section 1170.18, subdivision (k) (section 1170.18(k)), provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction [for various firearm prohibitions]."

2. *Because the Judgment Against Davis in This Case Was Not Final When His Prior Felony Convictions for Burglary and Petty Theft with a Prior Were Reduced to Misdemeanors Under Proposition 47, the Enhancements Associated with Those Convictions Are Invalid*

In *Abdallah*, we construed section 1170.18(k)'s "for all purposes" language to encompass section 667.5(b) sentence enhancements imposed after a felony conviction on which an enhancement rests has been reduced to a misdemeanor under Proposition 47. Applying that interpretation, we held that because the pertinent prior conviction of the defendant in *Abdallah* already had been reduced to a misdemeanor by the time of his sentencing, he "was not a person who had committed 'an offense which result[ed] in a felony conviction' within five years after his release on parole for his prior conviction" within the meaning of section 667.5(b)'s washing out requirement; therefore, we invalidated the sentence enhancement that was based on that conviction. (*Abdallah*, *supra*, 246 Cal.App.4th at p. 746.)

Abdallah does not control here because the trial court imposed the enhancements that Davis challenges before the convictions on which those enhancements rested were reduced to misdemeanors under Proposition 47. Davis asked the trial court to stay imposition of the enhancements pending disposition of his Proposition 47 application; the court declined that request and imposed the enhancements. Thus, unlike the defendant in *Abdallah*, Davis already had been sentenced when the convictions were reduced to misdemeanors. Nevertheless, we conclude that section 1170(k)'s "for all purposes" language applies to the enhancements that Davis is challenging because the judgment of which the enhancements are a part was not final when the convictions were reduced to misdemeanors.[10]

In concluding that the benefits of reclassification of an offense under Proposition 47 apply to section 667.5(b) sentence enhancements in nonfinal judgments, we adopt the analysis and reasoning of Division Two of the Fourth District in *People v. Evans* (2016) 6 Cal.App.5th 894, review granted February 22, 2017, S239635. In that case, as here, the defendant asked the trial court to stay imposition of a section 667.5(b) sentence enhancement based on a prior felony conviction until after a hearing on a Proposition 47 petition to reclassify that conviction as a misdemeanor. The court declined that request; it imposed

---

[10] A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired. (*People v. Kemp* (1974) 10 Cal.3d 611, 614.) The judgment against Davis was not final when the convictions on which the challenged enhancements rest were reduced to misdemeanors because Davis's appeal from the judgment was pending before us.

the sentence and entered judgment. The defendant appealed the judgment. As happened to Davis, while Evans's appeal was pending, the prior conviction on which the enhancement rested was reduced to a misdemeanor under Proposition 47. (*Id*. at p. 904.)

The Court of Appeal in *Evans* held that because the judgment was not final at the time the prior conviction was reduced, the enhancement was subject to Proposition 47 under the rule of *In re Estrada* (1965) 63 Cal.2d 740. (*People v. Evans*, *supra*, 6 Cal.App.5th at pp. 902-903.) The *Estrada* rule provides that, absent evidence to the contrary, a statutory amendment mitigating criminal punishment is presumed to apply retroactively to all defendants whose judgments were not yet final on the operative date of the amendment; the rule is an exception to the ordinary presumption in section 3 that statutes apply prospectively only. (*People v. Brown* (2012) 54 Cal.4th 314, 323.) As the court in *Evans* explained, "[t]he Estrada rule is based on legislative intent. 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' [Citation.]" (*Evans*, *supra*, at p. 903, italics omitted.)

Proposition 47 is an amendatory statute that mitigates punishment for certain offenders whom the measure identifies as having been treated too harshly at sentencing. Punishment that is mitigated under Proposition 47 is mitigated "for all purposes," as section 1170.18(k) states. We agree with the Court of Appeal in *Evans* that Proposition 47's "for all purposes" language must be informed by the *Estrada* rule. And under that rule, absent evidence to the contrary, Proposition 47's mitigation of punishment should be extended "to every case to which [that relief] constitutionally could apply," which means every case in which the judgment is not yet final. (*People v. Evans*, *supra*, 6 Cal.App.5th at p. 904.) We discern no evidence to the contrary that would preclude application of Proposition 47 relief to persons who seek to invalidate nonfinal sentence enhancements associated with felony convictions that Proposition 47 reduced to misdemeanors.

In *In re Diaz* (2017) 8 Cal.App.5th 812, review granted May 10, 2017, S240888, our colleagues in Division Four of this district questioned *Evans*. Over a dissent by Justice Epstein, *Diaz* held that "[t]he redesignation under Proposition 47 of a prior felony conviction to a misdemeanor operates prospectively, from the date of the redesignation forward, and not retroactively, as if the conviction always had been a misdemeanor." (*Id.* at p. 817.) The majority in *Diaz* disagreed with *Evans*'s interpretation of Proposition 47. According to the majority, by its terms, Proposition 47 establishes a mechanism for retroactive reduction of convictions only; it contains no mechanism for retroactive reduction of section 667.5(b) enhancements. (*Id.* at

p. 818.)[11] This is the principal argument the People make in opposing Davis's challenge to the enhancement at issue here.

In our view, the *Diaz* majority's interpretation of Proposition 47 discounted the broad sweep of section 1170.18(k)'s "for all purposes" language and the *Estrada* rule's presumption that Proposition 47's amendatory relief applies to nonfinal judgments. Under *Diaz*, it does not matter if felony convictions are reclassified as misdemeanors under Proposition 47 a few minutes after the imposition of enhancements based on those convictions or (as was the case here) a few months afterwards: either way, the enhancements must remain in place because the associated convictions were not yet reclassified when the enhancements were imposed. We do not read Proposition 47 to draw a line between an invalid and valid enhancement based on the date of reclassification of the associated conviction. Drawing the line based on whether the enhancements were final at the time of reclassification better comports with the text and purpose of Proposition 47 and the *Estrada* rule.[12]

---

[11] The majority in *Diaz* stated that *Evans* was distinguishable because "[u]nlike the defendant in *Evans*, Diaz did not obtain reclassification of [the conviction at issue] while his direct appeal was pending. He did so after his judgment was affirmed on appeal . . . ." (*In re Diaz*, *supra*, 8 Cal.App.5th at p. 823.) The majority made clear, however, that notwithstanding this distinction, it believed that Proposition 47 does not retroactively invalidate any enhancement, even those that are not final when the associated felony conviction is reduced to a misdemeanor. (*Id*. at pp. 818-823.)

[12] The Supreme Court soon will resolve where the line should be drawn. It has granted review in *Evans* and other cases involving retroactive application of Proposition 47 to final and

DISPOSITION

We strike the two one-year sentence enhancements that were based on Davis's prior felony convictions for burglary and petty theft with a prior for which he served prison terms. As modified, the judgment is affirmed. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

SMALL, J.*

We concur:

PERLUSS, P. J. SEGAL, J.

---

nonfinal section 667.5(b) sentence enhancements alike. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900 [lead case]; see also *In re Diaz*, *supra*, 8 Cal.App.5th 812, review granted May 10, 2017, S240888; *People v. Johnson* (2017) 8 Cal.App.5th 111, review granted Apr. 12, 2017, S240509; *People v. Evans*, *supra*, 6 Cal.App.5th 894, review granted Feb. 22, 2017, S239635; *People v. Jones* (2016) 1 Cal.App.5th 221, review granted Sept. 14, 2016, S235901; *People v. Williams* (2016) 245 Cal.App.4th 458, review granted May 11, 2016, S233539; *People v. Carrea* (2016) 244 Cal.App.4th 966, review granted Apr. 27, 2016, S233011; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201.)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.